

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 19, 2008 Session

STATE OF TENNESSEE v. RICKY LYNN PAYNE

**Appeal from the Circuit Court for White County
No. CR 2150 Leon Burns, Jr., Judge**

No. M2008-00465-CCA-R3-CD - Filed February 17, 2009

The Defendant, Ricky Lynn Payne, was found guilty by a jury of attempted first degree murder. He was sentenced to twenty years in the Department of Correction. In his first appeal, this Court affirmed the Defendant's conviction but vacated his sentence. The case was remanded to the trial court for resentencing. Upon remand, the trial court again sentenced the Defendant to serve twenty years in the Department of Correction. In this appeal, the Defendant argues that his sentence is excessive. The State argues that this Court should again remand this case to the trial court for a new sentencing hearing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

David Brady, Public Defender; and John Nisbet, Assistant Public Defender, Cookeville, Tennessee, for the appellant, Ricky Lynn Payne.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William E. Gibson, District Attorney General; Beth Willis and Doug Crawford, Assistant Attorneys General, for the appellee, State of Tennessee.

OPINION

Procedural History

Following a jury trial, the Defendant was convicted of attempted first degree murder and sentenced to twenty years in the Department of Correction. In his first direct appeal, this Court affirmed the Defendant's conviction of attempted first degree murder. However, this Court concluded that the trial court committed plain error by sentencing the Defendant pursuant to the 2005 amendments to our sentencing statutes. Because the Defendant's crime was committed prior to the effective date of the amendments, the Defendant should have been sentenced under the pre-2005 law because he did not execute a waiver of his ex post facto rights. Therefore, this Court vacated his

twenty-year sentence and remanded the case for resentencing. The trial court was instructed to ensure that the Defendant waived his ex post facto protections if he chose to be sentenced under the 2005 sentencing amendments. See State v. Ricky Lynn Payne, No. M2006-00762-CCA-R3-CD, 2007 WL2042494, at *12 (Tenn. Crim. App., Nashville, July 16, 2007).

Upon remand, following a hearing, the trial court sentenced the Defendant pursuant to the pre-2005 sentencing statutes. The trial court found that no applicable sentence enhancement factors had been shown and that no applicable sentence mitigating factors had been shown. The trial court therefore imposed the presumptive sentence for the Defendant's Class A felony conviction, twenty years, to be served in the Department of Correction. See Tenn. Code Ann. § 40-35-210(c).

The Defendant appeals, arguing that the trial court erred by not applying certain mitigating factors. On appeal, the State argues that this case should be remanded for another resentencing hearing at which the State could present additional evidence relative to the Defendant's sentence.

Underlying Facts

On November 12, 2004, the Defendant shot the victim in the shoulder with a .357 caliber pistol. The victim was the Defendant's brother. In the days prior to the shooting, the Defendant and the victim had been arguing about several matters, including the ownership rights to certain items of personal property. The Defendant had accused the victim of stealing some race car parts from a race car that the Defendant owned. The Defendant testified that his brother "flipped [him] a bird," which "triggered" the shooting of his brother.¹

Resentencing

At the beginning of the resentencing hearing, the State announced that it would present no witnesses at the hearing. After reciting to the trial court a brief history of the case, the State argued that the statutory presumptive sentence for a Class A felony was the mid-range, or twenty years. The State argued that an enhancement factor to be applied was the Defendant's criminal history which had been introduced at the first sentencing hearing. The State described these prior convictions as "[o]ne being a methamphetamine case. Another being, I believe, a simple possession case. Reckless endangerment, a misdemeanor reckless endangerment, and a drug paraphernalia case." The State then argued that, based upon the presence of this enhancement factor and the absence of any mitigating factors, the court should sentence the Defendant to twenty-three years.

Defense counsel then argued that the State had chosen not to put on any proof. Defense counsel asserted that in accordance with Blakely v. Washington, 542 U.S. 296 (2004), no enhancement factors could be applied to the Defendant's sentence except for the possibility of prior criminal convictions. Because the State had not put on any proof at the resentencing hearing, the Defendant argued that the trial court had nothing before it to consider insofar as prior convictions. Defense counsel also argued that the trial court should consider and apply certain mitigating factors based upon testimony presented at the Defendant's trial.

¹ For a detailed discussion of the facts and the issues presented on direct appeal, see State v. Ricky Lynn Payne, No. M2007-00762-CCA-R3-CD, 2007 WL2042494, at *14 (Tenn. Crim. App., Nashville, July 16, 2007).

The State then argued that none of the mitigating factors argued by defense counsel were applicable. The State also asked to be allowed to retrieve copies of the Defendant's prior judgments of conviction and submit them for the court's consideration as an enhancement factor.

The trial court concluded the hearing without specifically ruling on the State's request to be allowed to submit copies of the Defendant's prior judgments of conviction. The trial court ruled as follows:

THE COURT: Well, let me make a decision in this case and then let it go from there. I'm sort of tired of fussing about it.

As I understand it then, the Court of Appeals sent the case back for sentencing, resentencing, because we sentenced under new law, which at the time, at least the Court was reasoning, that that gives Mr. Payne the benefit of starting at the bottom and working up, as opposed to starting in the middle and working up or down. And the Court said that was incorrect, we'd have to sentence under the old law since Mr. Payne had not signed a written waiver of the *ex po facto* issues. And so now we're back with a sentencing hearing in which we have had argument, but no proof. And under old law, then the sentence for a Class A Felony, attempted first degree murder – that's what it was, attempted first, wasn't it?

[ASSISTANT DISTRICT ATTORNEY]: Yes, sir.

THE COURT: – would be 20 years. And then we would enhance if there were enhancements, or we would mitigate if there were mitigators. I don't think any apply, and, therefore, the sentence is 20 years.

There's no proof from anybody here, if I can't consider the record – if I'm going to consider the record to mitigate, then it seems to me that at least some of the proof that was introduced might be considered for enhancement. But there are no witnesses here, and no copies of – certified copies, or anything like that, so the 20 years is the sentence. So, that's – take it from there, and we may have it back.

Analysis

The Defendant faced a Range I sentence of fifteen to twenty-five years for attempted first degree murder, a Class A felony. See Tenn. Code Ann. §§ 39-13-202 (first degree murder); 39-12-101 (attempt); 39-11-117(a)(1) (classification of attempted first degree murder as Class A felony); 40-35-112(a)(1) (Range I sentencing for Class A felony).

In this appeal, the Defendant argues that the trial court erred by failing to apply certain mitigating factors to reduce the Defendant's sentence from the presumptive sentence of twenty years. The State argues that the trial court erred by refusing to allow the State to introduce certified copies of the Defendant's prior convictions. The State asserts that the prior convictions should have been applied to increase the Defendant's sentence above the twenty-year presumptive sentence. The State therefore argues that this Court should remand this case to the trial court for a new sentencing hearing at which the Defendant and the State would be allowed to present evidence and at which the

trial court should inquire whether the Defendant wishes to execute a waiver of his ex post facto protection.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.²

Both the State and the Defendant argue that the sentencing decision made by the trial court is not entitled to the presumption of correctness. It is apparent from this record that the trial court set the Defendant's sentence at twenty years because that is the presumptive sentence for his Class A felony conviction. See Tenn. Code Ann. § 40-35-210(c). The trial court found that no enhancement factors nor mitigation factors were applicable. Nevertheless, the transcript of the resentencing hearing does reflect confusion during the proceeding. Because the record does not

² We note that the legislature has amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353, § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crime was committed.

affirmatively show that the trial court considered the sentencing principles and all relevant facts and circumstances, we will review the Defendant's sentence de novo on the record without a presumption that the determination made by the trial court are correct.

We first observe that the record on appeal is indeed sparse. No testimony was presented by either party at the sentencing hearing. No presentencing report was introduced. When the State attempted to submit certified copies of certain judgments of criminal convictions for the court's consideration as an enhancement factor, defense counsel objected because the copies had been neither marked nor introduced. No proffer was made, and certified copies of the judgments of conviction referred to by the assistant district attorney at the sentencing hearing are not in the record. The trial court rendered its sentencing decision without ever specifically ruling on the admissibility of the certified copies.

The Defendant argued at the resentencing hearing that the trial court had previously found that "maybe" one mitigating factor applied: that the Defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. Tenn. Code Ann. § 40-35-113(11). The Defendant also argued that his sentence should be mitigated because he acted under strong provocation. Tenn. Code Ann. § 40-35-113(2). The Defendant conceded that at the prior sentencing hearing, the judge had concluded that the mitigating factors were "minor, if appropriate."

After considering the arguments made by the State and the Defendant, the trial court set the Defendant's sentence at the mid-point in the range, twenty years, which was the presumptive sentence for the Class A felony. As we have noted, twenty years was the term set by the same judge after consideration of enhancement and mitigating factors found to be applicable at the previous sentencing hearing.

Based upon our review of this record, we cannot conclude that the trial court erred by setting the Defendant's sentence at the statutory presumptive sentence, the mid-point of the Defendant's range. The trial judge did not clearly explain his reasons for the specific sentence he set, other than it being the statutory presumptive sentence. In our view, the record supports our conclusion that the trial court found that the mid-range sentence was the appropriate sentence for the Defendant's crime. The record supports the sentence imposed. Accordingly, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE